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Filing date: **12/05/2008**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91181083
Party	Defendant Blue Moe Apparel Inc.
Correspondence Address	Susan M. Schlesinger GRIMES & BATTERSBY, LLP 488 MAIN AVENUE, SUITE 3 NORWALK, CT 06851-1008 UNITED STATES schlesinger@gandb.com
Submission	Motion to Dismiss 2.132
Filer's Name	Susan M. Schlesinger
Filer's e-mail	schlesinger@gandb.com
Signature	/sms/
Date	12/05/2008
Attachments	Motion Dismiss Opp 91181083.pdf (11 pages)(852920 bytes)

In the Matter of Application Serial No. 78/908,342
Published in the *Official Gazette* on August 7, 2007

Inkslingers, Inc.	:	
Opposer,	:	
v.	:	Opposition No.: 91181083
Blue Moe Apparel, Inc.	:	
Applicant.	:	

APPLICANT'S MOTION FOR INVOLUNTARY DISMISSAL ON THE GROUND OF OPPOSER'S FAILURE TO PROSECUTE

PLEASE TAKE NOTICE THAT, upon the annexed declaration of Susan M. Schlesinger, dated December 5, 2008, and the arguments set forth herein, Applicant, Blue Moe Apparel, Inc., respectfully moves the Board to enter judgment against Opposer, Inkslingers, Inc., pursuant to 37 C.F.R. §2.132(a) due to Opposer's failure to submit any evidence whatsoever during its testimony period.

Opposer failed to introduce any evidence during its testimony period. Specifically:

1. Opposer did not attach copies of its pleaded federal registrations to the Notice of Opposition, (*see* D.I. #1; Schlesinger Dec. ¶ 4).[1]

2. Opposer did not attach current printouts of information on the pleaded registrations from the U.S. Patent and Trademark Office's electronic database records, (*see* D.I. #1; Schlesinger Dec. ¶ 5).

3. Opposer never sought to introduce the pleaded registrations during its testimony period, via a notice of reliance or otherwise. (Schlesinger Dec. ¶ 3, 6). Thus, the pleaded

[1] The "D.I." designation refers to the Board's docket index.

registrations are not a part of the trial record because they have not been put into evidence. *See* 37 C.F. R. §2.122.

4. The Board set Opposer's testimony period to open on October 10, 2008 and close on November 9, 2008 pursuant to the Board's communication with mailing date of December 5, 2007. (*See* D.I. #2; Schlesinger Dec. ¶ 2). Opposer did not take any testimony during its testimony period. (Schlesinger Dec. ¶ 3, 7-8, 10).

5. Opposer did not file a notice of reliance with the Board. (*See* D.I.; Schlesinger Dec. ¶ 8).

6. There is no other action in a court between the parties so no testimony from other proceedings has been taken. (Schlesinger Dec. ¶ 9). There is another pending opposition proceeding between the parties, Opposition No. 91181151. (Schlesinger Dec. ¶ 10). However, Opposer failed to take any testimony in that proceeding as well. (Schlesinger Dec. ¶ 10). Applicant is filing a motion to dismiss Opposition No. 91181151 on the same grounds. (Schlesinger Dec. ¶ 11).

Trademark Rule, 37 C.F.R. § 2.132 provides that "[i]f the time for taking testimony by any party in the position of plaintiff has expired and that party has not taken testimony or offered any other evidence, any party in position of defendant may, without waiving the right to offer evidence in the event the motion is denied, move for dismissal on the ground of the failure of the plaintiff to prosecute." 37 C.F.R. § 2.132.

As described above and in the attached declaration, Opposer has not taken any testimony nor offered any other evidence. Both the Federal Circuit and the Board have made clear that 37 C.F.R. § 2.132 (a) is to be strictly enforced. *See Hewlett-Packard Co. v. Olympus Corp.,* 18

U.S.P.Q.2d 1710 (Fed. Cir. 1991); *Procyon Pharm. Inc. v. Porcyon Biopharma Inc.*, 61 U.S.P.Q.2d 1542 (T.T.A.B. 2001).

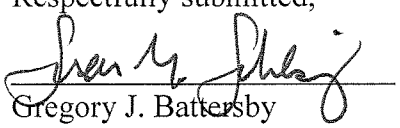
Nor can Opposer show good cause in failing to take testimony or submit other documentary evidence during its testimony period. It was incumbent upon Opposer to seek a timely enlargement of its testimony period to the extent it had an issue with an evidentiary matter. *Hewlett-Packard*, 18 U.S.P.Q.2d at 1712. Opposer did not do so.

Applicant's motion is timely filed. Applicant's testimony period set by the Board does not open until December 9, 2008.

Accordingly, for the reasons stated herein, Applicant respectfully requests an order entering judgment in Applicant's favor with prejudice, and for such other and further relief as the Board deems just and proper.

Dated: December 5, 2008

Respectfully submitted,



Gregory J. Battersby
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Attorneys for Applicant
GRIMES & BATTERSBY, LLP
Norwalk, Connecticut 06851-1008
Telephone No.: (203) 849-8300
Attorney Docket No.: WENS002USL2

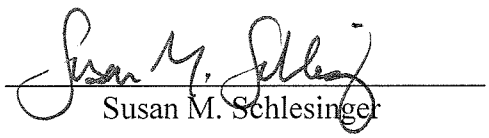
CERTIFICATE OF SERVICE AND FILING

The undersigned hereby certifies that a copy of the foregoing Applicant's Motion for Involuntary Dismissal on the Ground of Opposer's Failure to Prosecute was served on the Opposer on the date indicated below by depositing the same with U.S.P.S. firs-class mail, postage prepaid to:

Michael Jeziak
Inkslingers, Inc.
50080 Card Road
Macomb Township, MI 48044

and further certifies that the aforementioned Applicant's Motion for Involuntary Dismissal on the Ground of Opposer's Failure to Prosecute was filed with the Trademark Trial and Appeal Board on the date indicated below online through the ESTTA system of the United States Patent and Trademark Office.

Dated: December 5, 2008



Susan M. Schlesinger

In the Matter of Application Serial No. 78/908,342
Published in the *Official Gazette* on August 7, 2007

Inkslingers, Inc.	:	
Opposer,	:	
v.	:	Opposition No.: 91181083
Blue Moe Apparel, Inc.	:	
Applicant.	:	

DECLARATION OF SUSAN M. SCHLESINGER

1. I am an associate at Grimes & Battersby, LLP, 488 Main Avenue, Norwalk, Connecticut, counsel for Applicant Blue Moe Apparel, Inc. in this matter. I have personal knowledge of all facts stated in this declaration. I have personal knowledge of all facts stated in this declaration and I could competently testify to the facts in this declaration if called to do so. I submit this declaration in support of Applicant's Motion for Involuntary Dismissal on the Ground of Opposer's Failure to Prosecute.

2. The Board set Opposer's testimony period to open on October 10, 2008 and close on November 9, 2008 pursuant to the Board's communication with mailing date of December 5, 2007. A copy is attached as Exhibit A.

3. Opposer failed to introduce any evidence during its testimony period.

4. Opposer did not attach copies of its pleaded federal registrations to the Notice of Opposition.

5. Opposer did not attach current printouts of information on the pleaded registrations from the U.S. Patent and Trademark Office's electronic database records.

6. Opposer never sought to introduce the pleaded registrations during its testimony period, via a notice of reliance or otherwise.

7. Opposer did not take any testimony during its testimony period.

8. Opposer did not file a notice of reliance with the Board.

9. There are no other actions between the parties in any court.

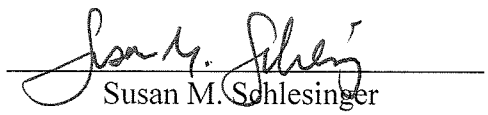
10. There is another opposition proceeding pending between the parties, Opposition No. 91181151. However, Opposer failed to take any testimony in that proceeding as well. Opposer's testimony period as set by the Board in Opposition No. 91181151 opened on October 15, 2008 and ended on November 14, 2008 so Opposer can no longer submit evidence in that proceeding either.

11. Applicant is filing a motion to dismiss Opposition No. 91181151 also on the ground of failure to prosecute.

12. Applicant's motion is timely filed. Applicant's testimony period set by the Board does not open until December 8, 2008.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: December 5, 2008



Susan M. Schlesinger

EXHIBIT A

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

Mailed: December 5, 2007

Opposition No 91181083
Serial No. 78908342

JAMES G. COPLIT
GRIMES & BATTERSBY, LLP
488 MAIN AVE STE 3,
NORWALK, CT 06851-1008 UNITED STATES

Inkslingers, Inc.

v.

Blue Moe Apparel Inc.

Inkslingers, Inc.
50080 Card Road,
Macomb Township, MI 48044 UNITED STATES

Clara Vela, Paralegal Specialist

A notice of opposition to the registration sought by the above-identified application has been filed. A service copy of the notice of opposition was forwarded to applicant (defendant) by the opposer (plaintiff). An electronic version of the notice of opposition is viewable in the electronic file for this proceeding via the Board's TTABVUE system: **http://ttabvue.uspto.gov/ttabvue/**.

Proceedings will be conducted in accordance with the Trademark Rules of Practice, set forth in Title 37, part 2, of the Code of Federal Regulations ("Trademark Rules"). These rules may be viewed at the USPTO's trademarks page: **http://www.uspto.gov/main/trademarks.htm**. The Board's main webpage (**http://www.uspto.gov/web/offices/dcom/ttab/**) includes information on amendments to the Trademark Rules applicable to Board proceedings, on Alternative Dispute Resolution (ADR), Frequently Asked Questions about Board proceedings, and a web link to the Board's manual of procedure (the TBMP).

Plaintiff must notify the Board when service has been ineffective, within 10 days of the date of receipt of a returned service copy or the date on which plaintiff learns that service has been ineffective. Plaintiff has no subsequent duty to investigate the defendant's whereabouts, but if plaintiff by its own voluntary investigation or through any other means discovers a newer correspondence address for the defendant, then such address must be provided to the Board. Likewise, if by voluntary investigation or other means the plaintiff discovers information indicating that a different party may have an interest in

defending the case, such information must be provided to the Board. The Board will then effect service, by publication in the Official Gazette if necessary. *See* Trademark Rule 2.118. In circumstances involving ineffective service or return of defendant's copy of the Board's institution order, the Board may issue an order noting the proper defendant and address to be used for serving that party.

Defendant's ANSWER IS DUE FORTY DAYS after the mailing date of this order. (*See* Patent and Trademark Rule 1.7 for expiration of this or any deadline falling on a Saturday, Sunday or federal holiday.) **Other deadlines the parties must docket or calendar are either set forth below (if you are reading a mailed paper copy of this order) or are included in the electronic copy of this institution order viewable in the Board's TTABVUE system at the following web address: http://ttabvue.uspto.gov/ttabvue/.**

Defendant's answer and any other filing made by any party must include proof of service. *See* Trademark Rule 2.119. **If they agree to, the parties may utilize electronic means, e.g., e-mail or fax, during the proceeding for forwarding of service copies.** *See* Trademark Rule 2.119(b)(6).

The parties also are referred in particular to Trademark Rule 2.126, which pertains to the form of submissions. **Paper submissions, including but not limited to exhibits and transcripts of depositions, not filed in accordance with Trademark Rule 2.126 may not be given consideration or entered into the case file.**

Time to Answer	1/14/2008
Deadline for Discovery Conference	2/13/2008
Discovery Opens	2/13/2008
Initial Disclosures Due	3/14/2008
Expert Disclosures Due	7/12/2008
Discovery Closes	8/11/2008
Plaintiff's Pretrial Disclosures	9/25/2008
Plaintiff's 30-day Trial Period Ends	11/9/2008
Defendant's Pretrial Disclosures	11/24/2008
Defendant's 30-day Trial Period Ends	1/8/2009
Plaintiff's Rebuttal Disclosures	1/23/2009
Plaintiff's 15-day Rebuttal Period Ends	2/22/2009

As noted in the schedule of dates for this case, the parties are required to have a conference to discuss: (1) the nature of and basis for their respective claims and defenses, (2) the possibility of settling the case or at least narrowing the scope of claims or defenses, and (3) arrangements relating to disclosures, discovery and introduction of evidence at trial, should the parties not agree to settle the case. *See* Trademark Rule 2.120(a)(2). Discussion of the first two of these three subjects should include a discussion of whether the parties wish to seek mediation, arbitration or some other means for resolving their dispute. Discussion of the third subject should include a discussion of

whether the Board's Accelerated Case Resolution (ACR) process may be a more efficient and economical means of trying the involved claims and defenses. Information on the ACR process is available at the Board's main webpage. Finally, if the parties choose to proceed with the disclosure, discovery and trial procedures that govern this case and which are set out in the Trademark Rules and Federal Rules of Civil Procedure, then they must discuss whether to alter or amend any such procedures, and whether to alter or amend the Standard Protective Order (further discussed below). Discussion of alterations or amendments of otherwise prescribed procedures can include discussion of limitations on disclosures or discovery, willingness to enter into stipulations of fact, and willingness to enter into stipulations regarding more efficient options for introducing at trial information or material obtained through disclosures or discovery.

The parties are required to conference in person, by telephone, or by any other means on which they may agree. A Board interlocutory attorney or administrative trademark judge will participate in the conference, upon request of any party, provided that such participation is requested no later than ten (10) days prior to the deadline for the conference. *See* Trademark Rule 2.120(a)(2). The request for Board participation must be made through the Electronic System for Trademark Trials and Appeals (ESTTA) or by telephone call to the interlocutory attorney assigned to the case, whose name can be found by referencing the TTABVUE record for this case at http://ttabvue.uspto.gov/ttabvue/. The parties should contact the assigned interlocutory attorney or file a request for Board participation through ESTTA only after the parties have agreed on possible dates and times for their conference. Subsequent participation of a Board attorney or judge in the conference will be by telephone and the parties shall place the call at the agreed date and time, in the absence of other arrangements made with the assigned interlocutory attorney.

The Board's Standard Protective Order is applicable to this case, but the parties may agree to supplement that standard order or substitute a protective agreement of their choosing, subject to approval by the Board. The standard order is available for viewing at: http://www.uspto.gov/web/offices/dcom/ttab/tbmp/stndagmnt.htm. Any party without access to the web may request a hard copy of the standard order from the Board. The standard order does not automatically protect a party's confidential information and its provisions must be utilized as needed by the parties. *See* Trademark Rule 2.116(g).

Information about the discovery phase of the Board proceeding is available in chapter 400 of the TBMP. By virtue of amendments to the Trademark Rules effective November 1, 2007, the initial disclosures and expert disclosures scheduled during the discovery phase are required only in cases commenced on or after that date. The TBMP has not yet been amended to include information on these disclosures and the parties are referred to the August 1, 2007 Notice of Final Rulemaking (72 Fed. Reg. 42242) posted on the Board's webpage. The deadlines for pretrial disclosures included in the trial phase of the schedule for this case also resulted from the referenced amendments to the Trademark Rules, and also are discussed in the Notice of Final Rulemaking.

The parties must note that the Board allows them to utilize telephone conferences to discuss or resolve a wide range of interlocutory matters

that may arise during this case. In addition, the assigned interlocutory attorney has discretion to require the parties to participate in a telephone conference to resolve matters of concern to the Board. *See* TBMP § 502.06(a) (2d ed. rev. 2004).

The TBMP includes information on the introduction of evidence during the trial phase of the case, including by notice of reliance and by taking of testimony from witnesses. *See* TBMP §§ 703 and 704. Any notice of reliance must be filed during the filing party's assigned testimony period, with a copy served on all other parties. Any testimony of a witness must be both noticed and taken during the party's testimony period. A party that has taken testimony must serve on any adverse party a copy of the transcript of such testimony, together with copies of any exhibits introduced during the testimony, within thirty (30) days after the completion of the testimony deposition. *See* Trademark Rule 2.125.

Briefs shall be filed in accordance with Trademark Rules 2.128(a) and (b). An oral hearing after briefing is not required but will be scheduled upon request of any party, as provided by Trademark Rule 2.129.

If the parties to this proceeding are (or during the pendency of this proceeding become) parties in another Board proceeding or a civil action involving related marks or other issues of law or fact which overlap with this case, they shall notify the Board immediately, so that the Board can consider whether consolidation or suspension of proceedings is appropriate.

ESTTA NOTE: For faster handling of all papers the parties need to file with the Board, the Board strongly encourages use of electronic filing through the Electronic System for Trademark Trials and Appeals (ESTTA). Various electronic filing forms, some of which may be used as is, and others which may require attachments, are available at **http://estta.uspto.gov**.